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Supreme Court of the United States

OCTOBER TERM, 1953

No. 442

THE RIO GUALEGUAY

FIDELITY-PHENIX FIRE INSURANCE COMPANY OF NEW YORK
Petitioner-Appellant Below

versus

FLOTA MERCANTE DEL ESTADO
Respondent-Appellee Below

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner prays for a writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit absolving a foreign shipowner, under the Fire Statute of the United States, of all responsibility for damage by fire to American-owned cargo aboard a foreign vessel maintained in violation of the Safety Statute of the United States; and petitioner respectfully shows:

I

QUESTION PRESENTED

The novel and important question of law presented for determination in this proceeding is:

> May the benefits of the Fire Statute of the United States—enacted to encourage American shipping—be accorded to a foreign shipowner despite maintenance of his vessel in violation of the American Safety Statute with which domestic shipowners must comply to be entitled to those benefits?

Implicit in the affirmative answer to this question by the Court of Appeals is its holding that "the benefit of" the Fire Statute "is not legislatively conditioned upon" the shipowner's "compliance with the safety act", a conclusion in direct conflict with the contrary holding of the Court of Appeals for the Fourth Circuit in *Hines vs Butler*,[1] hitherto the authoritative decision on this point.

Since the Fire Statute—affording, as it does, complete exoneration from, rather than mere limitation of, liability—is invoked in every case of fire on shipboard, and since a very large number of vessels plying American waters are foreign-owned, decisive resolution by this court of the significant question and inter-circuit conflict presented, is of the utmost importance to nautical interests throughout this and all other maritime nations of the world.

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[1] 278 Fed. 877 (CA 4-1921), aff'g. 264 Fed. 986 (DC Md.-1920); cert. den., 257 US 659.

II

JURISDICTION AND OPINIONS BELOW

Jurisdiction of this court is invoked under 28 USC 1254.

The opinion of the District Court was rendered on February 12, 1952, and is reported at 102 FS 861, 1952 AMC 597. The opinion of the Court of Appeals was rendered on July 10, 1953, and is reported at 205 F2d 886, 1953 AMC 1348. Rehearing was denied without opinion by the Court of Appeals on August 11, 1953, but at that time the court apparently deleted a sentence from its original opinion.

III

SUMMARY STATEMENT OF THE MATTER INVOLVED

The proceeding at bar was instituted through libel in admiralty by the insurer (petitioner) of a consignment of newsprint, to recover for damage thereto by fire in the hold of respondent's Steamship *Rio Gualeguay* while lying at dock in New Orleans.

Respondent, an agency of the Argentine Government, defended the action solely under the terms of the Fire Statute of the United States, which exonerates a shipowner from liability for damage to cargo by fire on shipboard, "unless such fire is caused by the design or neglect of such owner".[2]

[2] 46 USC 182, reprinted in Appendix A.

When the fire was first discovered, the hold was closed and the vessel's steam-smothering system[3] was placed in operation for forty minutes. When the hold was opened at the end of that time, it was obvious that, although the vessel had steam on her boilers,[4] no steam had entered the hold.[5]

The steam-smothering system was completely inoperative; and, in any event, was so constructed as to render it totally ineffective even had it been operative.[6]

Several hours later, the fire was extinguished by beaching the vessel and filling the hold with water pumped in by a fire tug.[7]

The ineffective condition of the steam-smothering system obviously resulted from respondent's "neglect" within the meaning of the Fire Statute.[8]

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[3] A system of pipes for smothering cargo fires by injection of steam from the vessel's boilers into the hold, with little or no damage to cargo. R 833-34.

[4] A short time later she moved away from the dock under her own power. R 86.

[5] R 84, 171, 491.

[6] R 202, 281, 388. The position of the discharge end of the steam line in the hatch coaming above the main deck would have precluded permeation by steam of the cargo hold below that deck. *Id.* The holding of the Court of Appeals that breach of the Safety Statute (46 USC 463) by failure to provide and maintain an effective steam-smothering system did not deprive respondent of the benefits of the Fire Statute, necessarily assumes the clear error in the contrary finding of the district court as to construction and maintenance of the system.

[7] R 64, 160.

[8] Respondent had never even inspected the system in the twenty-eight months during which it had owned the vessel before the fire. In answer to interrogatories, respondent stated that it had no information as to care, inspection or upkeep of the system, nor even a piping plan of it. R 42, 43. The system concededly was, or should have been, under the direct supervision of the vessel's port engineer. R 614. The latter's lack of diligent inspection, resulting in such a condition, constitutes "neglect" of the owner under the Fire Statute. *Great A & P Tea Co. vs Brasileiro*, 159 F2d 661, 664 (CA 2-1947), cert. den., 331 US 836.

Since 1905, an Act of Congress has required that all vessels carrying passengers or freight be equipped with operative steam-smothering systems.[9]

The Court of Appeals held that the foreign-owned *Rio Gualeguay* might avail herself of the Fire Statute of the United States despite violation of the Safety Statute of the United States; that libelant accordingly had not proved that the fire was caused by respondent's "neglect"; and that the libel was therefore properly dismissed.

IV

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The District Court had held that the evidence was insufficient to warrant a finding that the vessel's steam-smothering system was defective or inadequate.

The Court of Appeals reversed this holding by clear implication in finding that "there is no evidence of *negligence* (italics by the court itself) in either the construction or attempted use of the system which would preclude the defense afforded by" the Fire Statute.

The Court of Appeals held further that "the fire statute is not by its terms . . . conditioned" on the shipowner's "compliance with the safety act"; and that "whether . . . a foreign vessel should be denied the

[9] The Safety Statute, 46 USC 463, reprinted in Appendix B. The *Rio Gualeguay* was built in 1918 (R 638) and was acquired by respondent in 1941 (R 21).

benefit of the fire statute unless it has complied with the safety statute . . . is a question of policy for legislative determination—it is not for the courts to create the requirement."

The Fire Statute, as stated, expressly excludes from its purview, loss caused by a shipowner's "neglect". In view of the settled rule of maritime law, noted hereunder, that breach of a statutory duty constitutes negligence *per se*, it is difficult to conceive a more positive expression of legislative policy.

These holdings below are in specific conflict with that of the Court of Appeals for the Fourth Circuit in the leading case of *Hines vs Butler*,[10] in which a shipowner was denied recourse to the Fire Statute for failure properly to maintain aboard his vessel, the sprinkler system required by applicable safety regulations.

In its opinion herein as originally rendered, the Court of Appeals distinguished *Hines vs Butler*, on the ground that "in that case the court was concerned, not with the question we have here, but primarily with a question of limitation of liability"; but when the incorrectness of this statement was pointed out in application for rehearing, the court, without explanation or comment, apparently deleted the sentence physically from its opinion.[11]

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[10] *Supra*, note 1.

[11] The two additional elements of fault charged in the *Hines* case—failure to keep up a station bill and failure to carry out fire drills properly—obviously could have had no causal relation to the fire, but were mentioned solely in connection with the shipowner's attempt to limit liability under 46 USC 183.

In broader perspective, the decision below is a radical departure from the maritime rule (known as the "Rule of *The Pennsylvania*") established by this court,[12] that breach of a statutory duty not only amounts *ipso facto* to negligence, but places on the offending vessel "the burden . . . of showing not merely that her fault might not have been one of the causes (of the casualty), or that it probably was not, but that it could not have been".[13]

The acuteness of the present divagation is emphasized by the Court of Appeals' remark, in justification of its disregard of respondent's breach of the Safety Statute, that the statute "carries its own penalty for non-compliance". This is the direct antithesis of this court's own reason for its Rule of *The Pennsylvania* as "necessary to enforce obedience to the mandate of the statute".[14]

This departure from settled maritime rules, and resultant subversion of the plainly expressed meaning of a fundamental part of the Fire Statute, in open contra-

[12] *The Pennsylvania*, 86 US 125, 136 (1873); *Lie vs San Francisco & Portland SS Co.*, 243 US 291 (1917). In *The Denali*, 112 F2d 952 (CA 9-1940), cert. den., 311 US 687, the Rule of *The Pennsylvania* was applied in denying limited liability for cargo damage, on the ground that the shipowner had violated a safety statute limiting the hours of duty of deck officers.

[13] No such proof was, or could conceivably have been, made by respondent in the case at bar. The Court of Appeals took no issue with the rule that negligent failure to maintain fire-fighting equipment properly, even though it results in spread rather than ignition of fire, bars access to the Fire Statute: "But for such negligence, the fire might have been extinguished before the cargo was destroyed. Consequently, section 4282 (the Fire Statute) does not protect the petitioners against the claims of the owners of the lost merchandise." *Hines vs Butler*, 264 Fed. 986, 996 (DC Md.-1920), aff'd., 278 Fed. 877 (CA 4-1921), cert. den., 257 US 659. To the same effect: *Great A & P Tea Co. vs Brasileiro*, 159 F2d 661, 665 (CA 2-1947), cert. den., 331 US 836.

[14] *The Pennsylvania*, 86 US 125, 136 (1873).

diction of the Fourth Circuit's conclusion on the same question, should alone justify this court's intervention.

The concomitant exoneration of the foreign respondent on the ground of immateriality of its breach of the Safety Statute, because that enactment governs only American vessels, is unwarranted by the authorities cited by the Court of Appeals in its support.

Those decisions, which simply accord the Fire Statute's privileges to foreign vessels, stem tacitly from this court's holding that foreign shipowners are entitled to the benefits of the Limited-Liability Act, of which the Fire Statute is a part, on the same basis as shipowners of the United States.[15]

The Court of Appeals has distorted this holding into a precedent for bestowing the Fire Statute's liberal benefits on a foreign ship maintained in violation of statutory safety requirements, compliance with which is a prerequisite to recourse by American shipowners to the same privilege.[16]

This result is manifestly unfair to American cargo interests, which should have assurance that any vessel to be absolved of losses under the American Fire Statute will have complied with the American Safety Statute.

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[15] *The Scotland*, 105 US 24, 31 (1881).

[16] Respondent's neglect *vel non*, and the effect of such neglect under the Fire Statute, must be determined under the laws of the United States (*Restatement of the Law, Conflict of Laws*, sections 404, 411), surely including the Safety Statute designed to prevent the very eventuality which supervened.

More fundamentally, by placing foreign shipowners in a preferential position over American shipowners, the decision below has subverted the basic Congressional purpose of the entire Limited-Liability Act—encouragement of American shipping.[17]

It is submitted that the far-reaching implications of this novel holding[18] warrant attention and corrective action by this court.

V

CONCLUSION

This action involves novel application of the Fire Statute of the United States to prefer foreign over American shipowners, in contravention of the primary legislative purpose of the statute. It presents a direct inter-circuit conflict as to construction and effect of the important federal maritime statutes in controversy.

Authoritative determination of these issues is of ultimate moment to the maritime interests of the seafaring nations of the world.

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[17] *Moore vs American Transp. Co.*, 24 How. 1, 39 (1861).

[18] In two cases, access to the Limited-Liability Act has been accorded to foreign vessels which were not in compliance with American law but, unlike the *Rio Gualeguay*, were furnished with operative equipment found to be of substantially equivalent adequacy. *The Princess Sophia*, 61 F2d 339, 345-46, 347 (CA 9-1932), cert. den., 288 US 604-05; *The Cabo Hatteras*, 5 FS 725 (SD NY-1933).

It is respectfully submitted that the gravity of the questions at issue justifies allowance of the writ for which petitioner prays.

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October, 1953.

VI

APPENDIX

A

The Fire Statute

No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner.

46 USC 182

B

The Safety Statute
(Excerpt)

Every steamer carrying passengers or freight shall be provided with suitable pipes and valves attached to the boiler to convey steam into the hold and to the different compartments thereof to extinguish fire, or such other suitable apparatus as may be prescribed by the regulations of the Board of Supervising Inspectors . . .*

46 USC 463

* 46 CFR 95.05-10, not immediately relevant.